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Supreme Court of the United States

OCTOBER TERM, 1919.

THE SEABOARD AIR LINE RAILWAY, *Appellant*, v. THE UNITED STATES, *Appellee*. } No. 132.

BRIEF FOR APPELLANT.

This is one of four appeals in this court calling in question the validity of a new divisor set up by the Postmaster-General in 1907 in the computation of average daily weights of mails carried on the railroads, which average weights were the basis of the carriers' compensation. The issues are those on which by an evenly divided court decisions of the Court of Claims adverse to the railroad companies were affirmed here in the cases of the *Chicago & Alton Railroad Co.* and the *Yazoo & Mississippi Valley Railroad Co.* 242 U. S. 621, 622. It is assumed that no statement of these issues is needed in this case other than necessarily will be made in the framing of the argument.

ASSIGNMENT OF ERRORS.

In the following particulars the action of the Court of Claims is hereby assigned as error:

(1) In not holding that acts of Congress approved March 3, 1873 (17 Stat. Ch. 231, p. 558), July 12, 1876 (19 Stat. Ch. 179, p. 79), July 17, 1878 (20 Stat. Ch. 259, p. 142), and March 3, 1905 (33 Stat. Ch. 1480,

pp. 1087, 1088), established a working-days divisor for the computation of average daily weights of mails carried.

(2) In not holding that the uniform practice of the Postmaster-General before 1907, under said antecedent acts of Congress, established a mail divisor for use in all cases and that this divisor was recognized and adopted by Congress in the act approved March 2, 1907 (34 Stat. Ch. 2513, p. 1212).

(3) In not holding that, regardless of everything antecedent thereto, said act of March 2, 1907, prescribed a working-days divisor, to the exclusion of all others, for future use in all cases in the determination of such weight-averages.

(4) In not awarding judgment to appellant for the amount of the additional compensation it would have received by use of the divisor ninety (90) instead of the divisor one hundred and five (105) in computing the average weights of mail.

(5) In dismissing the petition.

PROPOSITIONS OF LAW.

When a statute not clear on its face is to be interpreted courts will consult legislative reports and debates for expressions or indications of the intentions of the legislative body.

St. Louis, Iron Mountain & Southern Ry. Co. v. *Craft*, 237 U. S. 548.

Tap Line Railroad Cases, 234 U. S. 1 (27).

United States v. *Delaware & Hudson Co.* 213 U. S. 366.

N. Y., N. H. & H. R. R. Co. v. *I. C. Com'n*, 200 U. S. 361.

United States v. *Freight Ass'n*, 166 U. S. 290.

Alexander v. *United States*, 12 Wall. 177.

When a statute, in its administration, has constantly received one interpretation, which is not obnoxious to all sound reasoning, the courts will give that interpretation to a new law in which the old is reenacted or which assumes that it will remain in operation.

United States v. *Midwest Oil Co.* 236 U. S. 459.
United States v. *Hermanos y Compania*, 209 U. S. 337.
Copper Queen Mining Co. v. *Arizona*, 206 U. S. 474.
Falk v. *United States*, 204 U. S. 143.
Brown v. *United States*, 113 U. S. 568.

Upon performance for and acceptance by the United States of a service for which compensation is fixed by statute, it is bound for the payment of that exact compensation.

United States v. *Andrews*, 240 U. S. 90.
Glavey v. *United States*, 182 U. S. 595.
Jacksonville, etc. Railroad Co. v. *United States*, 118 U. S. 626.
Eastern R. R. Co. v. *United States*, 20 Ct. Cls. 23.

If there was no true authority for the discretion of an executive officer exercised on one subject, such action is invalid even though, by the use of a discretionary power actually vested in such officer on another subject, the same result could have been accomplished.

United States v. *Barlow*, 184 U. S. 123 (133).
Collins & Farwell v. *United States*, 34 Ct. Cls. 294.
United States v. *Windom*, 8 Mackey (D. C.) 54.
Haywood v. *Quincy*, 44 Ia. 385.
Mobile Insurance Co. v. *Cleveland*, 76 Ala. 321.

State v. *Lutz*, 136 Mo. 638.
State v. *Porter*, 139 Ind. 63.
State Board, etc. v. *the People*, 123 Ill. 227.

ARGUMENT.

In all of the three other cases coming to be heard with this case attorneys of record, and in some of them other counsel in the quality of *amicus curiae*, have filed voluminous and able briefs. It is the aim of counsel in this case, so far as possible, to avoid redundancy of argument. They therefore at the outset—having chosen as their special subjects others of the common questions—submit without argument the following propositions—in which they have the same confidence that has inspired the efforts of other counsel:

(1) The act of March 3, 1873, *sup.*, was drawn by the Postmaster-General and passed by Congress for the purpose of standardizing the railway mail pay and, in so doing, of making permanent—and therefore it did make permanent—a plan which had been pursued since 1867 in determining average daily weights of mail carried.

(2) This act on its face indicated a working-days divisor and a working-day average of weights. Any other divisor would have been out of keeping with its provisions.

(3) In 1876 there had been fixed and established, by the use of a working-days divisor and the application of the full rates of pay named in the act of 1873, the rate of the annual pay per mile of every railway mail route, and when Congress, by the act of July 12, 1876, *sup.*, reduced the "compensation" of the carriers" ten per centum per annum from the rates fixed and allowed," it recognized and adopted both of the components used in calculating the compensation.

(4) Such a recognition and adoption occurred again when the act of June 17, 1878, *sup.*, was passed and the compensation of each route, computed and fixed under the act of 1876, was reduced five per cent.

(5) The act of March 3, 1905, increasing from "thirty successive working days" to "ninety successive working days" the minimum period for weighing the mails, with no other change in the law, was a readoption of the divisor which invariably had been applied to the dividend of weights ascertained by the weighing.

(6) Definite rates of pay were named in the act of 1873 for the purpose of relieving the Postmaster-General of the ungrateful task he had had in negotiating or otherwise determining rates for each railroad company.

(7) If the act of 1873 be deemed to have given the Postmaster-General a discretion to pay less rates than those named in it, that discretion existed for the following three years only; the act of 1876 reducing by a named percentage the "pay fixed and allowed by the act of March 3, 1876," accepted as an unvariable datum, upon which it was to operate, the identical full rates by which that pay had been computed.

(8) The Postmaster-General uniformly, both before and since 1907, has contracted with the railroad companies for a six days' mail service as a full consideration for the compensation computed by him and if, in case of a seven days' service, the Sunday trains were discontinued no reduction of the compensation could be made on that account.

These subjects, with propositions which they necessarily involve, together with the history of the railway mail pay from early times, have received very studious consideration in a brief filed by appellant's counsel in the appeal of the Kansas City, Mexico & Orient Railway Co. (No. 232). It is convenient here to refer to

and commend that brief as showing clearly, at pages 32 to 38, that the act of 1873 was correctly construed when it was treated as fixing absolutely the rates of pay for service performed in full compliance with the terms and conditions named, and as demonstrating, at pages 43 to 48, that a working-days divisor was provided for a working-days service, and therefore for every other kind of service. Also it is desired here to emphasize as unanswerable the contention there made, at page 48, that whatever reasons, after twenty-eight years' trial, may have recommended to Congress the practice pursued under the act of 1873 in ascertaining average weights, that practice was adopted by the act of March 3, 1905.

If what the Postmaster-General did in 1907 in the matter of the divisor had been done in 1906, the foregoing propositions, with the elucidation they have received in the briefs of other counsel referred to, would seem sufficient to stamp that action as unlawful. But these cases are concerned with events of 1907. How *then* did the law stand—what were the duties and prerogatives of the Postmaster-General and what were the rights of the railroads—in that year when mail pay questions came again to the front? Here arises the chief subject which has been selected for argument in this brief.

Congress in the legislation of 1907 for the first time made the mail divisor a subject of deliberation and of direct decision; and it decreed, in the future service, a working-days divisor.

When in 1907, 1908, 1909 and 1910 the Postmaster-General computed the pay of a railway mail route, he was bound to do it in accordance with the act of March

2, 1907, the last mandate he had received from Congress; and it would seem axiomatic that when courts come to rule upon the legality of the action taken by him they will subject it to that statute as a test. On any essential point the Postmaster-General should—this court will—study to learn what that enactment means. If a clear expression is found in the text of the statute the inquiry will go no further. Where the statute is silent, or of uncertain meaning, the court will search elsewhere for guides which the law prescribes.

With all deference to the disputation which has filled so many pages of the earlier briefs and opinions in this controversy, it may be said that there is nothing esoteric —nothing to mystify the student—in the law of statute construction. As in interpreting a contract a court has the single aim of ascertaining the common intention of the parties, so, in interpreting a statute, a court cares to know one thing only, viz, the intention of the legislature. All else—all other canons of interpretation—are but detail of this cardinal rule.

"The intention is the vital part, the essence of the law, and the primary rule of contracts is to ascertain and give effect to that." *Lewis's Sutherland on Statutory Construction*, 2d Ed. Sec. 363.

In Potter's Dwarris on Statutes the rule and its details are thus stated (Ch. 5, p. 125).

> "The end interpretation aims at is to find out the intent of the statute, instrument or writer; to clear up the meaning of words if they are obscure; to ascertain their sense if they are ambiguous, and to determine the design where the words express it imperfectly."

Dwarris quotes elaborate dissertations of Puffendorf, Grotius and other ancient doctors of the law to the like

effect. These writers, like Dwarris, set up the same test in regard to statutes and in regard to contracts, viz, the intention of the authors.

"The rules for construction of statutes are aids only to the discovery of the intention of the legislation, are not inflexible, and none are of such paramount importance as to defeat the intention when that clearly appears." *Trammell* v. *Victor Mfg. Co.* 102 S. C. 483, 487.

"The object in the construction of a statute is to ascertain and effectuate the intention of the legislature."

State v. *Barnett*, 173 N. C. 750.
Hazzard v. *Gallucci*, 89 Conn. 196.
State v. *Missouri Pacific Ry. Co.* 262 Mo. 720, 730.
Commercial Trust Co. v. *Hudson County Board*, 86 N. J. L. 424.

"The fundamental rule in the construction of a statute is that the legislative intention must prevail whenever that intention can be ascertained." *Brackett* v. *Chamberlain*, 115 Me. 335.

The Court of Claims has been at great pains to avoid learning what was the intention of the Fifty-ninth Congress regarding the mail divisor.

No candid person who chanced to sit in the galleries of the House during the last days of February and the first days of March, 1907, could fail to understand that the House, in establishing a scheme of mail pay for future operation, had considered the question of a mail divisor in all its bearings and had settled the question in favor of the working-days divisor.

Significance of the act of 1905.

The legislation of 1907 can better be understood and appraised if some consideration is first given to the steps by which the law of March 3, 1905, *sup.*, was enacted. There was a case of the adoption of an institution (mail divisor) by avowedly keeping hands off it.

In framing their appropriation bill in 1905 the House Committee on Postoffices and Post Roads made provision for a divisor which would include Sundays as well as working days; but this encountered parliamentary objection, as involving change of law and therefore being out of place in an appropriation bill, and the committee contented themselves with an extension of the weighing time from thirty-five days (thirty working days) to one hundred and five days (ninety working days), to which latter there was no serious objection in the House, and the parliamentary point was waived. The original provision was:

> "That hereafter, before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster-General shall have the mails on such routes weighed, and the average per day ascertained for a period of not less than three consecutive months."

The point of order being reserved against this by Mr. Mann, the chairman of the Committee, Mr. Overstreet, offered a substitute as below:

> "That hereafter, before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, and at such times after June 30, 1905, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

Upon the reading of this new clause Mr. Overstreet said:

> "In explanation of that proposition I will say that the language of the provision which I have just had read at the clerk's desk is identical with the existing law except the word "ninety" is used in place of the word "thirty" as the term or period for weighing the mail. I used the same language of the law as it now is, and has been for many years, in order that there could be no question of the constructions that have been made of the law."

Mr. Mann withdrew his point of order, the substitute provision was adopted as an amendment to the bill and so a period including ninety working days was established for obtaining aggregate weights to which, in the ascertainment of the average, the working-days divisor should apply (Cong. Rec. Vol. 39, pt. 2, p. 1744).

Novel feature of the legislation of 1907.

When the court, in ascertaining the purposes (and therefore the effect) of the act of 1907, inquires into the proceedings by which it was accomplished, it will observe, repeated many times on page after page, two words which, so far as the record shows, were never spoken before in either house of Congress in relation to average rates of mail, viz, "divide" and "divisor." Naturally the weight divisor *now* received especial and very thoughtful consideration. The occasion of these proceedings and the results were:

The House committee had put in its bill one paragraph containing these alternative provisions having the one object of retrenching mail pay; one to establish a new divisor of weights, which would have affected all mails, large and small alike, and one, which applied only to mails in excess of the average of five

thousand pounds per day (to be determined by the antecedent weighings provided for) reducing by percentages the rates of pay. The relative operation of the two expedients, as well as the history and the reasons for the working-days divisor, were fully explained to the House and then on three successive parliamentary issues the proposed change in the divisor was rejected. The parliamentary difficulty being removed by a special rule, a rate-reducing amendment was considered on its merits and was adopted.

Finally, on two issues going to the merits of the question, the House voted down a proposed new divisor.

The action of the House was peculiarly well-informed and deliberate and it settled all questions of policy involved.

The decisive character of this legislation will hardly be appreciated unless the legislative proceedings are reviewed in detail.

The bill of the House committee was accompanied by a report in three parts (House Report No. 7312, 59th Cong. 2d Sess.). The main report, speaking for the committee, contained in some eleven pages of print about two pages relating to four changes of law proposed "by way of reduction of compensation for the transportation by mail by railroads." Regarding the divisor the committee, after referring to conditions of 1873, said:

> "In the judgment of the committee the constantly increasing practice of railroads to maintain daily service, including Sundays, has brought about a decided change from that which existed at the time the law was enacted in 1873."

The committee's plan was to use as a divisor the number of days on which the mails were weighed. Part 2 of the report was signed by a single member of the com-

mittee and it took the view that the divisor should include all days of the weighing period, notwithstanding that there might be no weighings on some of those days. It said:

> "It is claimed that the Department by excluding Sunday in fixing compensation observed the 'commandment of rest.' It will hardly be contended that a construction of the statute which warrants the weighing of the mails on Sunday would at the same time exclude that day in the computation as to pay. I hardly think it fair to invoke the commandment of rest at the expense of the Government."

The views of five members, a minority of the committee, was presented in Part 3 of the report. This opposed any change whatever in the divisor. Speaking of postal routes on which the mails were carried every day in the week, it said:

> "To protect them from being required, through the phrase 'average daily weight,' to accept one-seventh less than the six-day roads, the words 'working days' were incorporated into the original law; that is, the Sunday mails are counted in the Monday weights, and as if carried on Monday. The Department seems never to have found any intricacy or difficulty in administering the law as it stands, and no substantial result can be conceived to follow the adoption of the change other than an arbitrary reduction of 14 per cent affecting railroads performing the greatest service for the Government, and those only."

So it would seem the House had an ample text upon which to consider and determine how the average daily rates of mails should be determined. Added to these documents, however, was a long communication prepared less than two months before by the Second Assistant

Postmaster-General and forwarded to the chairman of the House committee giving the history of the railway mail pay and of the working-days divisor (including a Departmental announcement of a new divisor in 1884, which was abandoned by reason of an adverse ruling of the Attorney-General) and concluding as follows:

> "In view of this condition of the service, the intention of the law as disclosed by the history of the subject and the practice and construction placed upon it by the executive officers who were charged with its execution, of the contemporaneous declaration that in this respect the law adopted the practice which existed before its passage, and of the long-continued and unbroken maintenance of this construction upon the highest legal authority, I have to submit that the average daily weight as ascertained by the existing practice of the Department is the correct one contemplated by the statute" [of 1873].
>
> Very respectfully,
> W. S. SHALLENBERGER,
> *Second Assistant Postmaster-General.*"
> Cong. Rec. Ib. pp. 3350, 3351.

There was extensive debate during four days in which the divisor was considered from every point of view.

Before any action was taken on the above provision of the bill an amendment was offered as follows:

> "*Provided*, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed" (Present record, p. 22).

A point of order was made against this amendment on the ground that it changed existing law. The chairman sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the Chair feels bound to follow. *The proposed amendment changes the existing law as construed by the proper officer by changing the divisor.*"

Upon appeal this ruling was sustained. Then another effort was made to change the existing law by an amendment as follows:

"*Provided*, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and,

"*Provided further*, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

(Cong. Rec. *Ib.* pp. 3469, 3472).

This was more specific in that it directed that the term "working days" should be construed to mean transportation days. It was in effect the same as Order 412, as to those routes carrying the mails seven days a week, and the same as Order 165 (promulgated by the Department in March, 1907, and cancelled by Order 412 in June) as to those routes carrying the mails only six days a week. This went out on the same point of order and then the paragraph to which these amendments were added in the bill as reported by the committee was ruled out. Thus the House as a legislative body decided that the working-days divisor was established by law and refused to avail of an opportunity to change it.

The House then adopted an amendment offered by

the chairman of the committee, providing for readjustment and reducing compensation on certain routes, but making no change in respect of the system that had always been followed for ascertaining the average weights, and enacted the bill. The way had been prepared for this by a special rule adopted by the House saving it from the objection that it would change the existing law.

When the bill came up in the Senate an amendment identical with that first rejected by the House was adopted by the Senate without debate or explanation. In conference objection was made on the part of the House to this amendment and upon the recommendation of the conferees the Senate receded from the amendment. Both houses adopted the report of the conferees and the bill was passed with this amendment stricken out and containing the House committee's provision for a reduction of rates (Rec. p. 23).

A new divisor, now being written into the bill, was considered by the conferees and by the two Houses on its merits. Probably in previous votes most members of the House had given more thought to the justness and expediency of one divisor, as compared with another, than to the parliamentary questions involved. It is common knowledge that, when legislators are called on to sustain or to reverse a ruling of the presiding officer vital to the matter under consideration, rules oftentimes do not stand in the way if there is a very strong sentiment in favor of the action proposed. Still there was a difference in form between the action of the House taken in shaping the bill and its action taken when its complete bill came back from the Senate with amendments. There was no possible reason to say that the latter action did not speak the judgment of the House on the merits of the Senate amendment.

The most significant thing of all occurred when, on announcement of the Senate's action, the chairman of the House committee moved to send the bill to conference. Mr. Murdock, a member of the committee, who, as has been shown, had stoutly championed a change in the divisor, opposed this procedure and appealed to the House for a direct vote on the Senate (La Follette) amendment regarding the divisor. He said:

> "As the bill left the House, after final action by the House, the railway mail pay was cut in the region of two and one-half to three millions of dollars. As the bill left the Senate, after final passage through the Senate last night, railway mail pay is cut about $8,000,000. If you vote up the motion now to suspend the rules, I believe that every man here who votes for this motion made by the chairman of the Committee on Postoffices and Post Roads will vote to cut railway mail pay about $3,000,000. If he votes down that motion and against that motion, he cuts off an opportunity to concur in the Senate amendment and cut railway mail pay about $8,000,000. The issue is plain. I would like to see every member of the House on record on that issue. The railway mail pay, which is the biggest thing in this bill, and which is one of the biggest single items of expenditure in any government, has been under impeachment for thirty-three years. It has been condemned time after time by Postmasters-General, and its correction has been attempted by four different commissions, each commission ending in a dog fall. Now, this Congress has come up to the point of cutting down the railway mail pay. Are you going to side-step the opportunity or are you going to be courageous and cut it what ought to be cut? That is all I have to say."

By vote of the House on the same day the motion of Mr. Overstreet was agreed to (ayes 136, noes 46) and

the bill was sent to conference (Cong. Rec. Vol. 41, pt. 4, p. 4030, pt. 5, p. 4033).

Here was Armageddon. Here banners were raised and battle joined. And the hosts of the working-days divisor were the greater and prevailed against the hosts of the new divisor.

The Court of Claims has left this whole incident out of the finding (Rec. p. 23) and has used language which may well be taken to mean that nothing occurred between the passing of the bill by the Senate and the creation of a conference. "The bill was *then* sent to conference." (Italics ours.)

When a rule was brought into the House by which to save the rate-reducing provision from the parliamentary objection Mr. Overstreet, the chairman of the committee, was asked why the same thing was not done on behalf of the proposed new divisor. Mr. Overstreet replied that as "a practical man" he was arranging for the thing which the House apparently chose to do, omitting the thing to which the House was opposed (Cong. Rec. Vol. 41, pt. 4, pp. 3233, 3234).

Congress in 1907, as before, was the sole judge of the expediency and justness of any mail divisor. In 1907 it settled all questions of policy in favor of a working-days divisor. It decreed that this was the correct divisor to meet conditions of that time, including the modifications it had decided to make in the law.

Order 412 defied the law by making reductions of fifteen per cent where the law provided reductions of five per cent and reductions of ten per cent where none were provided.

Being items of one paragraph in the committee's bill, the provisions (1) for a new divisor and (2) reductions in the rate of pay for the larger mails naturally were considered by the House in the light of their correla-

tions. The chairman and other members of the committee explained that there was a difference of opinion in the committee, as well as among others having an understanding of the subject, between a change of the divisor and the establishment of new rates as methods of reducing the pay. It was pointed out that the amount to be retrenched by any change of the divisor could not be foretold with any approach to accuracy, and therefore some were of opinion that, whatever changes of conditions might occur to affect the reasonableness of the current pay, the better method would be to maintain always a constant divisor and make changes in the rates alone. In regard to the rates it was shown that the pay on some of the routes, carrying very large mails, ran to very large figures—much, it was supposed, above the demands of reasonable compensation—while the pay for the smaller mails was none too much, being almost insignificant in some cases cited. Mr. Murdock favored reductions both by rates and by divisor (Cong. Rec. Vol. 41, pt. 4, pp. 3124, 3127, 3140, 3141, 3143, 3233, 4030). As appears above, the bill as it passed the House operated a saving for the Government of about $3,000,000. Mr. Murdock was for saving about $8,000,000.

So the House considered and made its choice between three plans: (1) A new divisor, affecting the pay for all the mails, and a reduction of rates of pay for the larger mails. (2) A change in the divisor alone, affecting routes of large mails and small mails alike. (3) A reduction of rates alone in regard to the larger mails with no reduction as to the small mails. The House chose the latter of these three expedients, and in so doing definitively rejected the others.

The compensation computed and paid to the railroad companies in the four contract sections (1907, 1908,

1909, 1910) under Order 412 was about ten per cent less than would have been paid for the same aggregate weights of mail by the working-days divisor (Reports of Second Assistant Postmaster-General for 1907 to 1913 inc.). So, then, although Congress by the act of 1907 fixed the pay for the large mails at ninety-five per per cent of what they would have received for the same weights of mail at the old rates (and did this in absolutely mandatory terms) the Postoffice Department actually has paid for the larger mails 85 per cent of those amounts.

Congress said: "*Hereafter the rates shall be * * * five per cent or less than the present rates,*" etc. The Postmaster-General makes the law to be "*Hereafter the rates on such routes shall be * * * fifteen per centum less than the present rates.*"

Equally shocking, of course, is the operation of Order 412 upon the small routes. Congress decided that the pay of those should remain as it was. Yet the Department has taken away ten per cent of that pay.

The Pertinence of the Congressional Documents, Debates, etc.

In this review of the legislative incidents of 1907 it has been assumed that the law which resulted did not on its face dictate the use of other than the working-days divisor. Government counsel, it is believed, will not contend here for any more than that, in relation to the divisor, each of these laws is ambiguous. Surely it can not be contended with any sort of reason that the act of 1907 could have been administered, or now can be construed by this court, without looking beyond its four corners to learn what method, by the intention of Congress, was to be employed in ascertaining average daily weights of mail.

When a statute not clear on its face is to be interpreted, the rule of the law (which is nothing else than the rule of common sense) is that the proceedings by which the legislation was accomplished will be consulted for whatever light they may throw on the purposes (not indeed of individual legislators but of the legislative chamber as a corporate whole) by which the choice of words and phrases was dictated. Here it is a privilege to avail of what has been said in the brief filed by counsel for appellant in one of the other cases in the present group, the Northern Pacific Railroad Co.'s, appeal number 109 (pp. 41, 43, 44, 49, 50, 51).

A specially interesting point made in the Northern Pacific brief (the Court of Claims to the contrary notwithstanding) is that the intention of the law may be gathered from what the legislators refused to put in it as well as what they did put in it. *Alexander* v. *The United States*, 19 Wall. 177 is cited. The more recent case of the *United States* v. *Delaware & Hudson Co.* 213 U. S. 366, is to the same effect. The opinion in that case, written by the present Chief Justice, says:

> "Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected (1906, 40 Cong. Rec. pt. 7, pp. 7012–7014). And the considerations just stated we think completely dispose of the contention that stock-ownership must have been in the mind of Congress, and therefore

must be treated as though embraced within the evil intended to be remedied, since it can not in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that *the mind of Congress was fixed* on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide such a contingency in express language gives rise to the implication that it was not the purpose to include it." (Italics ours.)

The cases of the "tap line" railroads, still later than the *Delaware & Hudson* case, reported in 234 U. S., should put a quietus on all quibbling regarding the pertinence of debates (not to say committee reports or other documents) to the interpretation of the law enacted. There the court in a very summary way said (p. 27): "The debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show," etc.; and from these debates the court drew the conclusion that Congress, as against the broad inhibition expressed in the statute, meant to give to the class of railroads in question the rights contended for in the suit.

For obvious reasons the courts, when seeking the meaning of statutes, do not concern themselves with the motives which determined the votes of individual legislators—only those things will be considered which are regarded as speaking for the legislative body as a whole. But this corporate action may well turn upon information obtained in the debates; and it is for this reason the debates, failing other lights, are sometimes consulted by the courts. In the present case the House learned through the debates that in 1884 the Attorney-

General had ruled that any other than a working-days divisor was inconsistent with the law; that the Second Assistant Postmaster-General then (1907) was of opinion that the average daily weight obtained by the working-days divisor was "the correct one contemplated by the statute" [of 1873]; that at the prevailing rates of pay some postal routes in the thickly settled States were receiving pay of from eighty thousand dollars to near two million dollars per annum; that the proposed change of rates would reduce the pay to the railroads at large about $3,000,000 per year, while a change of the divisor might operate a reduction of from four million to six million per year—nobody being able to make any close estimate (Cong. Rec. Vol. 41, pt. 4, p. 3234). The influence upon the House as a whole of these facts, supplementing the report of the committee and the explanatory statement made by its chairman, produced a conviction that the working-days divisor, and none other, ought to apply in future years in connection with the new rates then established.

The Effect of Administrative Interpretation of an Earlier Statute in Pari Materia.

If the Congressional deliberations of 1907 had been confined to the question of rates of pay per pound—if nothing had been proposed or, in any authoritative way, said in relation to the divisor of weights—then the statute which resulted necessarily would have taken that interpretation upon which the act of 1873 had been applied.

The Court of Claims again—for what reason is not quite clear—concerns itself with *United States* v. *Hermanos y Compania*, 209 U. S. 337. Nothing else can be made of that case by any ingenuity than (1) that

seven justices of this court deemed the Government's contention to be correct both upon the bare terms of the statute in question and upon the interpretation which constantly had been given to the statute in its administration during some nine years, and (2) that the two remaining Justices (the present Chief Justice and Mr. Justice Peckham) had some different view regarding the interpretation of the act by first impression but concurred with the main opinion on the other point. How the two justices could more forcefully have stated the controlling effect in such a case of an administrative interpretation, is hard to conceive.

The comparatively recent case of the *United States* v. *Midwest Oil Co.*, 236 U. S. 459, seems especially worthy of analysis and comparison with the case now at bar. The matter at issue there was the validity of orders issued by the President of the United States, without specific authority of law, withdrawing public lands from sale. The court, in an opinion by Mr. Justice Lamar, said:

> "We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of legal consequences flowing from a long-continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the executive, by a special order, had withdrawn land which Congress by general statute had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that 'the practice dates from an early period in the history of the Government' (*Grisar* v. *McDowell*, 6 Wall. 381). Scores and hundreds of these orders have been made, and treating them as they must be (*Wolsey* v. *Chapman*, 101 U. S. 769),

> as the act of the President, an examination of official publications will show that (excluding those made by virtue of special Congressional action (*Donnelly* v. *United States*, 228 U. S. 255), he has during the past 80 years, without express statutory authority—but under the claim of power so to do—made a multitude of executive orders which operated to withdraw public land that would otherwise have been open to private acquisition."

On consideration of this opinion it will be found that there were less imperative reasons by far in that case than in the case here presented for looking to the antecedent administrative practice for the interpretation of the law:

(1) The President's action relative to the lands was not part of the law under which lands were sold. On the contrary its effect was to abridge that law. What the Postmaster-General did, in the matter of the mail averages, *was* a necessary function in the administration of the act of 1873 and subsequent laws.

(2) Although the President's withdrawals of land from sale were not infrequent, they were, in the proper sense of the word, occasional merely; they did not attach to every section or township or even every large body of lands open to entry and sale. The Postmaster-General's computation of average weights of mail occurred every year in one or another of the four contract sections. For this reason, and the one above, Congress could not escape knowing the method by which the computations were made at the Postoffice Department; whereas it was only by some accident Congress was informed of the President's withdrawals of land.

(3) The statute finally enacted regarding land-withdrawals was not precisely what the President, when issuing his proclamations, had expected. On the other

hand, the necessary effect—and the purpose, as well—of the legislation of 1907 was to continue the use of the mail-divisor which had always obtained. Moreover, when Congress again, viz, in 1908, was asked to legislate upon the divisor, it refused to authorize a departure from the old divisor in the contract sections where the four-years contracts had not expired (Cong. Rec. Vol. 42, p. 3221).

(4) The subject of the President's proclamations regarding the lands was not the same throughout the whole period reviewed. It was not until a comparatively recent date that such withdrawals of *mineral* lands had been made. In the matter of the mail weights there had been but one subject of action all those years. For some forty years before 1907 the Postmaster-General had precisely the same thing to do each year, to wit, to obtain from the aggregate weights of the weighing period an average weight *per diem*.

It will be observed, moreover, that the three dissenting justices, as well as the majority of the court, in searching for the true significance and effect of the land-withdrawal statute before them, carefully considered proceedings in Congress of which it was the result.

The three dissenting justices also, in their very exhaustive opinion, recognized to its full extent the definitive significance of a continuous executive interpretation of a statute. It is observed in that opinion that Congress had provided for withdrawal of lands from entry in two cases, and that the past withdrawals sustained by the court "it is believed would be found in one or the other categories above stated" (p. 392). Further on it is said (p. 405):

> "The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legis-

> lation or *long-continued acquiescence* as public purposes for which such withdrawals could be made by the Executive. * * * We are unable to find sanction for the action here taken in withdrawing a large part of the public domain from the operation of the public land laws in the power inherent in this office as created and defined by the Constitution or in any way conferred upon him by the legislation of Congress or in that *long acquiescence sanctioned by Congress* in such manner as to be equivalent to it. (Italics ours).

In *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, there was to be construed a statute which, first enacted by the legislative assembly of Arizona in 1887, was reenacted, by codification alone, in 1901. It was copied from a Colorado statute. Before the original legislation of Arizona the Colorado statute had been construed a single time in one way by the Supreme Court of that State, and the Arizona statute, during the four years preceding its codification, had been construed in the opposite sense by the Equalization Board of that territory, charged with its administration; and the Supreme Court held that the latter construction must govern; the court observing that the law having been reenacted by the Arizona codification, "it may be presumed that the construction is satisfactory to the legislature unless plainly erroneous, since otherwise naturally the words would have been changed."

Discretion of the Postmaster-General.

Broad assent has been given above to the proposition of other counsel that since 1876 rates and other constituents of the railway mail pay have been fixed beyond all control of the Postmaster-General. It is desired here to add a few words regarding the unique episode of 1884

in which the Postmaster-General received some very definite advice in this connection.

By the publishing of an order to make the divisor include all days of the weighing, and the submitting of this to the Attorney-General (Rec. pp. 18-20), two questions in effect were raised: (1) Was the divisor a matter of the Postmaster-General's discretion; and (2), if not, what divisor did the law prescribe? The reply (to both questions) was that any other than the working-days divisor would "defeat the intention of the law." If one thing was required by the law, the Postmaster-General manifestly had no discretion to set up something else in its stead.

If a belief in a discretion of the Postmaster-General really was entertained at the Department momentarily in 1884, it is clear enough that no such idea found lodgment there at any other time before March 2, 1907. The most that can be said is that at one time, in 1878, there was some thought of giving the Postmaster-General very large discretion over the railroad mail pay. It was suggested that the *quantum* of the service performed by the railroads would be measured better by the space occupied in the cars than by the weight of the mails, and that the Postmaster-General should have power to say what car space should be assumed in the pay-computation for any given weight of mails carried and a bill to that effect was introduced in Congress. Of that proposal the Postmaster-General himself, in his report for 1878, said:

> "The passage of the act, fixing certain rates per linear foot per mile, according to the speed of the trains, etc., without prescribing a gauge expressly limiting the amount of space to be required in each case, would leave the amount of space to be used and paid for to the discretion of the Postmaster-

> General; this would leave to his judgment the rates to be paid for conveying the mails on 77,000 miles of railroad. Argument to show that this should not be done is unnecessary."

That Congress fully shared the views of the Postmaster-General, is shown by the legislation, in the Post-office appropriation act approved March 3, 1879, which followed on his recommendation (20 Stat. L. Ch. 180, p. 358). There the Postmaster-General was directed to ascertain as well as he could the cost and proper compensation for mail transportation, and this was added:

> "He shall, in his annual report to Congress, *make such recommendations* founded on the information obtained under this section, as shall, in his opinion be just and equitable." (Italics ours.)

So lately as in his report for 1905 the Postmaster-General told in some detail of the progress made in enlarging and improving the railway mail system, and he explained what advantages his Department could obtain, and what it could not obtain, through competition of the railroad companies. He said (p. 20):

> "The wide extension of the railway systems of the country and the very active competition between them have made the competition very much more active; hence it is that while the Department does not secure lower rates of compensation it secures better service and larger amounts of service by its fixed rule to give all through mails to the road which renders the best service and quickest delivery. As between the trunk lines this often means a full train of postal cars scheduled to meet the needs of the Department. * * *
>
> "Wherever competition is possible, the Department, being unable to secure a lower rate of pay, uses the volume of mail to be dispatched to secure better service. Hence, where several competing

> lines between terminal points plead for an equitable division of through mail, the policy of this office is to deny the request and give the mail to that road which will permanently schedule and maintain the best train service."

When an agent, entirely free, embarks upon a large project, he himself fixes the conditions and terms of the work and then submits the project to competitive bidding as to the *price*. Naturally the Postmaster-General would have awakened competition with respect to the prices he must pay for railway mail service if so much as a suspicion had been entertained by him and his advisers that this was permitted by law. Knowing that this was not permitted, he sought to avail of railroad competition the other way round, by stimulating each competing railroad company to offer the best *service* it could perform.

Counsel for the Government in the proceedings have referred, and the court in its present opinion refers to various statutes enacted in the years 1813, 1815, 1838, 1839 and 1845, by which authority was given specifically to the Postmaster-General to have the mails carried on steamboats, to establish the mail service on railroads, and to classify the railroad routes with the view to an equitable adjustment of pay.

The first thought that suggests itself in this connection is that these grants of power to the Postmaster-General presupposed that he did not have inherently any broad, indefinite authority over the same subject-matters, and that, from these statutes, he derived no powers except those stated. This latter end the statutes guarded in part by express limitations against an increase of expense through the use of the improved methods of carrying, by the requirement of public advertisement in the letting of contracts, by the specific

fixing of the bonus that might be allowed for night service on the railroads, etc.

No better statement, for the present purpose, of the functions and powers of the Postmaster-General could be desired than is afforded in *United States* v. *McDaniel*, 7 Pet. 1, 13:

> "A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the Government."

Surely the fixing of pay for the railway mail service is not among the "minute movements" of the Postoffice Department; it is rather among the "great outlines," constantly controlled by Congress.

The novel thing in the act of 1873 was that it (and, as we have said, upon the motion of the Postoffice Department) specified the rates of compensation that were to be paid for the railway mail service, this function, during the experimental stages, having been entrusted to the Postmaster-General within the limits to which we have referred; and now the fact that stands out in all the legislation which commenced in 1873 is

that *the fixing of the pay for the railway mail service is one thing that Congress has kept rigidly in its own hands.*

In the *Delaware, Lackawanna & Western Railroad Co.* v. *United States*, decided on April 14, 1919, and not yet officially reported, this court held that since the findings did not import that the railroad company had a contract for any fixed period of time, the Postmaster-General seemed to have power to apply forthwith the reduced rates (in excess of five thousand pounds) which the act of 1907 provided. This was very, very far from saying that, mid-way of a contract period or at its commencement, the Postmaster-General could fix a rate or any other factor in the mail pay which he had evolved from his own sense of justice and expediency.

The Railroad Companies are Not Estopped.

Upon the assumption that the Postmaster-General's Order 412 was lawful, and therefore a part of the contract, (Rec. p. 59), the Court of Claims concludes its opinion with an argument that because the railroad companies performed the service after this order was promulgated they are estopped to complain of it. As regards railroads not land-aided a second assumption in the argument is, of course, that the railroad companies had their option to carry or not to carry the mails. By way of general comment on numerous cases cited in the opinion (pp. 59–61), it may be said that there is no case in any of the reports which holds that there is no legal obligation on a railroad company having no land-aid to carry the mails when called on by the postal authorities to do so. That precise question has never been presented for decision. What has been decided, in varying circumstances, is that there is no obligation to perform the service at the particular rates, or on some particular conditions, prescribed by the Postmaster-General.

A number of cases cited by the Court of Claims have to do with performance of work without protest for more than eight hours in cases where there was an eight-hour law which the public officer in authority, being vested by the law with a discretion, had never put into effect. The irrelevance to this case is obvious.

There are some cases in this court and more still in the Court of Claims to the effect that a railroad company operating trains on track belonging to another company, which latter has a contract for carrying the mails, can not be compelled to perform mail service, and when of its choice it becomes a "lap" route for such service it is bound to the rates named by the Postmaster-General (*Philadelphia & Baltimore Central Ry. Co.* v. *United States*, 103 U. S. 703; *Texas & Pacific Ry. Co.* v. *United States*, 28 Ct. Cls. 379. Probably it never was asserted that a railroad company is under any obligation to do anything whatsoever in relation to track (not its own) where it was under no duty to operate trains.

Eastern Railroad Company v. *United States*, 129 U. S. 391, also cited in this opinion, decided merely (1) that the railroad company had contracted, by implication, to carry the mails for reasonable compensation within a maximum fixed by Congress and (2) that, having asquiesced for a long time in new rates fixed, it could not then be heard to say they were not reasonable.

It may well be contended that in virtue of the acts of Congress of July 7, 1838 (5 Stat. 283), and March 3, 1845 (Ib. 738), making all railroads postal routes and directing the Postmaster-General to inaugurate mail service thereon, the Government has the power in some way to compel the carriage of the mails on any and all railroads. If other means fail, the Government, obviously might take possession of and operate the trains for the purpose of hauling the mails. This, however,

seems immaterial. When the Seaboard Air Line Railway on and following July 1, 1908, and 1909, respectively, received and transported the mails it did so because practically there was no escape from so doing. Postoffice cars, under previous arrangements with the Department, were running on its tracks. The Government's agents in the main brought the mails to those cars and received them therefrom, the employees of the railroad companies having no hand in the loading and unloading. Employees of the railroad company were not permitted to enter the postoffice cars for any other purpose than to operate the train (Postal Laws and Regulations of 1902, Sec. 1449). Therefore to hold that a railroad company could have avoided carrying the mails is to say that it had a right to put its employees forcibly into the postoffice cars and throw the mails therefrom—this at the risk, at least, of a riot with the postal agents. No such thing, it is submitted, can be required of any citizen for the protection of his rights.

BENJAMIN CARTER,
Attorney for Claimant.

JAMES F. WRIGHT,
Of Counsel.

In the Supreme Court of the United States.

OCTBBER TERM, 1919.

THE SEABOARD AIR LINE RAILWAY, Appellant, *v.* THE UNITED STATES. } No. 132.

THE NEW YORK CENTRAL & HUDSON River Railroad Company, Appellant, *v.* THE UNITED STATES. } No. 133.

KANSAS CITY, MEXICO & ORIENT RAILway Company of Texas, Appellant, *v.* THE UNITED STATES. } No. 232.

APPEALS FROM THE COURT OF CLAIMS.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, on behalf of the United States, and respectfully moves the court to advance the above-entitled cases for hearing on the same day as *Northern Pacific Railway Company, Appellant*, v. *The United States*, No. 109 on the docket for the present term.

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These four cases are known as the Divisor Cases and involve the question of the method to be employed in determining claimants' compensation for transporting the mails. The cases are substantially similar to the cases of *Chicago & Alton Railroad Co.* v. *United States* and the *Yazoo & Mississippi Valley Railroad Co.* v. *United States*, argued to this court at the 1914 term and reargued at the 1916 term and affirmed without opinion by an equally divided court. (242 U. S. 621.)

While the cases present somewhat different questions, some of the appellant carriers being land-grant roads and others not, the cases are all of the same general character, and as stated in its opinion were heard together in the Court of Claims (53 Ct. Clms. 258, 272). It is therefore respectfully suggested that the convenience of the court may be served by a setting of the cases for hearing on the same day.

Counsel for the appellants in the several cases have been notified of this motion and state that they have no objection to the setting of the cases for hearing on the same day, provided they are afforded full time for the presentation of their respective cases.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SEABOARD AIR LINE RAILWAY, APPELLANT,
v.
THE UNITED STATES.
No. 132.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is one of the Divisor Cases mentioned in the Government brief filed in Nos. 133 and 232. The facts are slightly different from the facts in those cases; but do not alter the questions raised and discussed therein.

This brief is filed to state the issues in this particular case and to notice such matters as may not be covered by the briefs filed in the other divisor cases.

Claimant is a corporation organized under the laws of the State of Virginia. It operates, and for a time prior to July 1, 1907, had operated a system of railways in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama, over

which it has transported the mails under contracts with the Postmaster General on thirty routes established by him. An enumeration is contained in Findings of Fact I, Record, page 13. It is not deemed important.

In the construction of four of these lines of railroad the plaintiff was aided by grant of lands made thereto by the United States, and was not aided by any grant by the United States in the other twenty-six routes.

On twenty of these routes mail is carried every day. The other ten are so-called "six-day routes."

For the service performed by plaintiff on the routes involved in its claim known as "six-day" routes, the aggregate annual pay during the period July 1, 1908, to June 30, 1912, was $7,286.86, and during the period July 1, 1912, to June 30, 1916, $7,381.45.

For the service on the seven-day routes (other than route 114025) during the period of July 1, 1908, to June 30, 1912, the aggregate annual pay was $383,769.09, and $485,647.09 during the period from July 1, 1912, to June 30, 1916. On said seven-day route No. 114025 the annual pay was $16,883.52 during the period from July 1, 1908, to June 30, 1909, and $42,983.07 during the period from July 1, 1909, to June 30, 1912. (Finding II, R. 14.)

The arrangements under which claimant had been transporting the mail on certain of the routes served

by it were to expire on June 30, 1908. In January, 1908, the Postmaster General wrote to the claimant stating his intention to conduct the usual quadrennial weighing of the mails carried upon those routes "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1908." (Finding XI.)

These statutes were the act of March 3, 1873 (Rev. Stat., sec. 4002), as amended or affected by the acts of March 3, 1875 (18 Stat. 341), July 12, 1878 (19 Stat. 79), June 17, 1878 (20 Stat. 142), March 3, 1905 (33 Stat. 1088), and March 2, 1907 (34 Stat. 1212). These statutes are set out and discussed in the *New York Central* case.

The Postmaster General's letter specially called attention to Order No. 412, which was quoted, and stated that the whole number of days included in the weighing period would be taken as a divisor. The Postmaster General sent to claimant, as was also customary, a "distance circular," to be filled out and returned for the purpose of giving certain information not here material. The circular contained what is sometimes called an agreement clause, which read:

> The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department, applicable to railroad mail service.

Said Order 412, which was a modification of Order 165 made in March, had been issued on June 7, 1907. It reads:

> Order No. 412.—Ordered that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:
>
> "That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

On May 25, 1908, the claimant returned the distance circular above referred to duly signed, and in the following year it executed and returned a like distance circular which was sent it for a route upon which the quadrennial period expired June 30, 1909.

The Postmaster General caused the average daily weight of mail carried by the claimant on the foregoing routes to be calculated as provided in Order No. 412. On the basis of this calculation he stated, by an order of which notice was given the claimant, the pay which the claimant would receive upon the routes served by it. The claimant thereafter carried the mails over these routes and received the compensation stated by the Postmaster General.

The same forms of distance circulars were sent the claimant for the routes where an adjustment of pay was to be made for the term beginning July 1, 1912.

The claimant returned the distance circulars with a typewritten agreement clause substituted for that printed. It read:

> The company named below agrees to accept and perform mail service upon the conditions prescribed by valid and existing laws, and valid regulations of the Post Office Department, applicable to railroad mail service made in conformity therewith. (Finding XI, R. 26.)

The reply of the Department dated June 20, 1912, was as follows:

> In regard to the statements contained in the typewritten form of agreement and acceptance substituted by your company for the agreement clause of the circular, and in reply thereto, I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term of this service, and to usual customs and practices in relation to railroad mail service, and that no other or further compensation for such service performed will be paid than that fixed by the orders of the Postmaster General.

No reply appears to have been made by the claimant to this letter.

An order dated September 19, 1912, fixed at certain figures the compensation which the claimant would be paid for carrying the United States mails over the routes which it served. The claimant continued to carry the mails as offered to it and it received without protest payments as stated in the orders of the Postmaster General.

The petition herein was filed June 27, 1914. A total recovery exceeding $200,000 is asked.

ARGUMENT.

I.

The canons of construction contended for by appellant have no application, for the reason that there is no ambiguity in the statutes.

The appellant in this case has adopted on the main points the briefs of counsel in the other cases (App. Br. pp. 4, 5, 6, 20). The discussion in its brief is confined mainly to the congressional history of the acts of March 3, 1905 (33 Stat. 1088) and of March 2, 1907 (34 Stat. 1212), and its significance in construing said acts.

Following the course of the appellant the Government relies on its briefs filed in the other Divisor Cases (Nos. 109, 133, 232) in reply to the several propositions stated in appellant's brief pages four and five.

As to the propositions of law advanced on pages two and three, we say:

That in cases to which such principles are applicable the doctrine that legislative reports and debates

may be consulted as aids to construction to the limited extent laid down in the decisions is not disputed.

It is, however, denied that any ambiguity exists in any statute here involved or any need for construction.

It is also insisted that the legislative history supports the obvious meaning of the statutes and confirms the conference upon the Postmaster General of a continuing discretion in the matters of method of ascertaining weights, subject to the minimum requirements prescribed, and the fixing of compensation, not exceeding the maximum rates.

The interpretative value of a course of administrative action is not disputed where the meaning of an act is doubtful.

But here it is denied that any such doubtful meaning exists and further that the course of action does not establish any other construction of the statutes save the existence of the continuing power of the Postmaster General to exercise his discretion within the limits, minimum and maximum, fixed by the statutes.

Again, we appeal to the fact that from 1907 the administrative interpretation has affirmed the discretion of the Postmaster General to adopt the method of mail weighing now pursued, and that Congress has made its appropriations on the estimates of the Postmaster General reported as made on this basis, and there has been no legislative direction to change the method.

It is submitted that citations to the point that the United States is bound for the compensation attached to an office where fixed by statute are not applicable to these cases.

Here the railroads were contracting for the carriage of the mails. They had no right, by election or otherwise, to carry them. They contracted to take them at a stated sum and this measured their compensation.

The plaintiff's contention would establish the point that if there were two parallel railroads and one offered to take the mails at a lower price than the other—being less than the maximum price allowed—the Postmaster General would have no right to accept the better bid but must pay the maximum price for the service.

The last proposition of law that an action had under one claim of discretion can not be sustained because by invoking a valid discretion on another subject the same result would be attained, even if conceded, is wholly inapplicable here. The thing to be done by the Postmaster General was to readjust and fix compensation for carrying the mails; to do this he had to ascertain average daily weights and fix a fair and reasonable compensation, not exceeding certain rates. (Rev. Stat., sec. 3999.)

It is not disputed that he took and had the weights for the 90 secular working days; also the actual weights for Sundays. The division by 90 or 105 was a mere matter of mathematics.

He knew if the statute required him to use 90 days as a divisor and he divided his 105 days' weights by 90 the quotient would be, in fact, an average of 1⅛ days' weights. He might well say, "I will only pay the maximum rate if I use the 105-day divisor. The statute says the minimum number of days I shall weigh; it says nothing beyond this of how I shall proceed to ascertain average weight, or what compensation, not exceeding certain rates, I shall allow."

In saying to the railroads "in applying maximum rates I shall use the divisor stated in Order No. 412," he was fixing a compensation identical with what would result if he had said "I shall use the old divisor 90 but I will use six-sevenths of the maximum rate in fixing compensation."

The discretion is really, in the reaching proper compensation, of applying what he deems a fair and reasonable rate (within the maximum) to his average daily weight. If the maximum rate was in his opinion excessive when applied to an average really one-seventh too much, he would not pay it. It was immaterial which side of his multiplication sum he reduced, unless he was tied both as to a divisor and a rate of pay.

II.

Appellant's statement and deduction from the legislative history of these statutes is incorrect.

It is incorrect to say that Congress in the legislation of 1907 for the first time made the mail divisor system a subject of deliberation and direct decision and decreed in future service a working day divisor.

This statement concedes that the act of 1905 did not change the act of 1873 in any respect except by substituting 90 days for 30 days in said act.

It also shows that any failure to adopt a change of divisor was due to a point of order that such change could not be made by amendment to an appropriation bill over a point of order that it was different legislation. It therefore is without significance on the subject here involved.

It is incorrect to say that on two issues going to the merits of the question the House voted down a new proposed divisor. The thing actually voted down was an attempt to tack on to an appropriation bill a proposition to alter the discretionary method of 1873, by inserting a mandatory divisor, when it had been ruled out of order as improper legislation in such bill. For a full history of this legislation and a further reply to the rest of appellant's brief, the brief for the appellee in Nos. 133 and 234, is here submitted. Such brief and that in No. 109 are also relied on and respectfully here submitted on all points herein set up.

No notice has been taken in appellant's brief of the fact that appellant is as to a small part of its lines a land-grant road. It has, therefore, not been thought necessary to discuss this phase here. Reference on the subject, however, is made to the appellee's brief in *Northern Pacific R. R. Co.* v. *United States*, No. 109.

III.

The appellant accepted the Postmaster General's notice that Order No. 412 would be used without objection and carried the mails and accepted the compensation.

Two mail weighings are here involved. In that of 1908, when the Postmaster General sent his distance circular and notified the railway that he would use Order No. 412 in weighing, they signed the agreement clause without any objection. The compensation was fixed and received without demur.

When the like circular and notice was sent out for the 1912 weighing, the only form of dissent was the return of the agreement clause signed but changed so as to agree to perform under the conditions prescribed by valid and existing laws and valid regulations of the department.

Although Order No. 412 was in the notice designated and quoted as the method of weighing to be used, no objection was made to it except as it might thereafter be claimed to be invalid.

But the Postmaster General replied, refusing to contract on the substituted agreement and insisting that all existing regulations (Order No. 412 having

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No 132

SEABOARD AIR LINE RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

Brief, as *Amicus Curiae*, of Counsel for the Minneapolis, St. Paul and Sault Sainte Marie Railway Company.

L. T. MICHENER,
Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES

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SEABOARD AIR LINE RAILWAY COMPANY, Appellant, v. THE UNITED STATES.	No. 132.

On Appeal From the Court of Claims.

BRIEF AS AMICUS CURIE, OF COUNSEL FOR THE MINNEAPOLIS, ST. PAUL AN SAULT SAINTE MARIE RAILWAY COMPANY.

On leave of Court granted, this brief is filed on behalf of the Minneapolis, St. Paul and Sault Sainte Marie Railway Company, it having now pending in the Court of Claims a case quite similar to the case at bar. The principal purpose of this brief is to discuss certain features of the case at bar, bearing on the contract relations between the Government and the railroads growing out of protests made by them against Order No. 412.

I.

Comments on Briefs.

1. Counsel for this appellant relies upon the refusal of Congress in 1907 to enact a new method of ascertaining average weights, as being equivalent to legislation fixing for the future the old method (which it was proposed to change) regardless of whether it had been right or wrong theretofore. This view of the law of the case is earnestly urged upon the Court by him, as it was in the Chicago & Alton case, in which a similar judgment of the Court of Claims was affirmed by an equally divided court (242 U. S. 621). We submit that counsel for appellant makes the most of his argument and demonstrates from the established facts that, if the principle of law he advocates be sound, this is plainly a case to which it must apply.

Other railroad counsel, including the undersigned, contend that the cases here are strong enough without depending upon anything but the construction manifestly proper from an analysis of the laws which were left unchanged, that is to say, upon what Congress did rather than what it did not do. The brief for appellant in the case of the Kansas City, Mexico & Orient Railway Company, No. 232, is typical of this school of thought, counsel in that case showing every evidence of holding the view, as we do, that in the construction of statutes the first recourse is to the statute itself. The simple analyses of the act of 1873 (R. S. 4002) made for appellant in that case, as we submit, show conclusively that the constructions which were contemporaneously and continuously given it by the department, both as fixing the rates of pay and as providing exclusively and mandatorily a working day

divisor in every case, were not only possible but the only possible ones (Brief, pp. 34-36; 47-48).

In discussing other terms of the act bearing perhaps less directly but almost as intimately upon the method of ascertaining averages the same conclusion is reached (pp. 49-51) and the argument is pursued to the point of eliminating any other divisor as possible under the act (pp. 51-53). The argument proceeds in entire independence of the fact that these constructions were given the act by the department, and as if the matter were the subject of original inquiry. The service conditions existing at the time of the passage of the act of 1873, the authorship of the act, the similarity of its language with the language of the department's weight circulars, the departmental construction, the construction by the attorney general, the re-enactment of the act without change after Congress had been specifically informed of the practice under it, and other such circumstances are treated as merely confirmatory of the constructions, if they could have been a matter of serious doubt in the first instance. This we submit to be the correct line of reasoning, and we give both the method employed, the analyses of the act and the conclusions reached, our endorsement. We think we are justified in saying, from a long and intimate contact with the operations of the Post Office Department, that the act of 1873, was a piece of expert legislative draftsmanship by someone who knew not only just what was wanted but also how to put it in shape to defy successful attack upon the things it was intended to accomplish.

2. Counsel in No. 232, as we submit, has been at unnecessary pains in exposing the repeal, modification or irrelevance of every collateral statute relied upon by the Court of Claims and the inconsistencies of the

opinion of that court for all these things seem quite apparent. Authorities to sustain the propositions of law relied upon are cited in great abundance in the brief of counsel for appellant in the Northern Pacific case, No. 109.

II.

The Contract.

1. Counsel for appellant in No. 232, relying upon its execution of the identical thing tendered by the Postmaster General as its contract, has been content to show that it was nothing more than an express agreement upon a statutory contract; that the correspondence "on the side" was no more than each party's construction of the contract; and that, in any event, nothing the Postmaster General might say or do could make any difference in the compensation for a service fully meeting the conditions imposed by law, because he was not *sui juris*.

Being concerned with a somewhat different phase of the same thing, we desire to pursue that line of argument a little further. No matter what turn the correspondence actually took, whether it resulted in an unchanged agreement clause, an augmented agreement clause, or nothing signed at all, the result was the same; all resolved into either an express or an implied contract for the performance of, and payment for service under the conditions prescribed by law and the valid regulations of the department. We have adopted the formula of the agreement clause on the distance circulars because it so clearly and briefly clothes the idea.

In all the cases, the Postmaster General wrote the railroad company a letter stating that the mails were

about to be weighed for the purpose of obtaining the data upon which the compensation might be adjusted for the ensuing term *in accordance with the several acts of Congress governing the same.* Accompanying this letter was a distance circular bearing what was known as the agreement clause, reading: "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service." In some cases, the railroad company, without altering what was already written, added thereto some such language as "exception taken to Order 412 of June 7, 1907," signed the agreement clause as augmented and sent the paper in to the department.

To this action by the railroad company the Postmaster General habitually replied, in substance and effect, that note had been taken of the exception but that the department would not enter into any contract with any railroad company whereby it would be excepted from the operation of any postal law or regulation, or any order of the Postmaster General, and that it must be understood that in the performance of the service throughout the term the company would be subject, as in the past, to all the postal laws and regulations and orders of the Postmaster General. This ended the correspondence, the service was performed and the railroad company took what money it could get, under an order stating that its compensation, *under the acts of 1873, 1876, 1878, 1905 and 1907,* would be so many dollars per mile per annum.

We submit that it is perfectly clear that, without considering the Postmaster General's reply at all, if Order 412 was valid the railroad company was bound by it notwithstanding its addition to the agreement

clause, because it had not refused the service on the terms "prescribed by law and the regulations of the department." It follows from this that although the railroad company had not signed the physical form offered it, yet it had not stipulated against Order 412 if the same were lawful, and that its action bound both itself and the Postmaster General, when he obtained the service, to the same thing as if it had not made the addition, bearing in mind all the time that this did not include any regulation which was not lawful, as a regulation contrary to law is no regulation at all.

Nor can we see that the situation is altered in any respect by the Postmaster General's reply, because this reply was nothing more than a reiteration of his original proposition, and the railroad's silence thereafter bound it to nothing more. Therefore, whether it be an express or an implied contract, it was in the last analysis only one for the performance of service under the conditions prescribed by law and the regulations of the department, with the railroad entirely free to question the legality of anything advanced in the guise of a regulation. It is hardly necessary to add that the rights of the parties under contracts are the same, whether the contracts be express or implied.

2. Even if the railroad company had refused to sign anything at all, the implied contract, growing out of the Postmaster General's ordering and accepting the service and the railroad company performing it, would be precisely the same as the express or the implied contract evidenced by its signature to the proposition tendered by the Postmaster General, or to some composition of its own in which the Postmaster General's proposition was incorporated. This because the Postmaster General, by tendering a contract look-

ing for its liquidation on his part to the laws and regulations, and by virtue of the lack of a refusal of those terms by the company, would be bound to the laws and regulations and for its part the company, by performing the service and not rejecting the terms proposed would be bound by them.

3. We submit that the theory that the order stating the pay was the first tender of a contract and is binding on the railroad company is the sheerest fallacy. The Postmaster General had been obtaining and the railroad company had been performing for several months a service upon an express or an implied contract, in the performance of which by the Post Office Department the order stating the pay was only a step. Under the express or the implied contract this step was to be taken "according to the several acts of Congress governing the same," and that is what it actually purported to do. If it wasn't done that way it was subject to correction at the instance of either party.

It would not help the Government's case any, however, if the order stating the pay was the contract, for the reason that any incidental statements in the order must give way to the declared governing statements if there was any inconsistency between them. The cap must fit the base. A grantee of lands contracted for and conveyed by metes and bounds is entitled to the area contained therein, regardless of what it may be stated to amount to. In this order of adjustment the Postmaster General said that he was computing the compensation of the particular route according to the acts of 1873, 1876, 1878, 1905 and 1907, and that on that basis it amounted to so much per mile per annum. The acts mentioned were the metes and bounds of the compensation. *They* gov-

ern the compensation, and the question is whether the computation is in accordance with or in defiance of them.

We submit that it is perfectly evident from the facts found that the minds of the Postmaster General and the railroad companies met upon the proposition that the service was to be performed and paid for on the terms prescribed by law and the regulations of the department, and that the question whether Order 412 was within the laws and regulations was one which would have to be a matter for judicial determination. All highly technical discussion on the subject of the contract from any other standpoint merely adds confusion to the case without leading to any different conclusion because, in the absence of any express or implied contract predicated upon a "meeting of the minds," the law steps in and raises the same contract that would have been express or implied if there had been a meeting of the minds. On the other hand, if the order stating the pay be the contract, we see that it is not the mere figures which control but the laws which were declared to have been their foundation. The result, and the ensuing inquiry, is the same by any road we travel.

No different situation can be presented except by the absolute rejection by the carrier of all propositions, coupled with a declaration of intention to seek reasonable compensation without regard to the provisions of law. We do not discuss such a situation because it is not involved in the cases before the Court or in any in which counsel is interested, so far as we know.

L. T. MICHENER,
Amicus curiae on behalf of
the Minneapolis, St. Paul
and Sault Sainte Marie
Railway Company.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 132.

SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF AMICUS CURIÆ FOR BELLEFONTE CENTRAL RAILROAD COMPANY.

This brief is filed, by leave of court and by consent of counsel in this case, *amicus curiæ*, for the Bellefonte Central Railroad Company, claimant in a similar case in the Court of Claims.

Counsel in this case discusses with industry and conviction the effect to be given to the refusal of Congress, in 1907, to enact legislation intended to bring about a change in the method of ascertaining averages. If we were disposed to do so we could add nothing to what he says on the subject.

Reference is made to brief for appellant in the Kansas

City, Mexico & Orient Railway Co. of Texas case No. 232, and we think we should join in that reference for the reason that counsel in that case pays less attention to extraneous circumstances than other counsel do, and, to our mind, clearly shows that the act of 1873, by its own terms, irresistibly, and in every respect, compelled the construction contemporaneously and for so long given it by the officials charged with its application. We refer particularly to pages 35 and 36, where the act is analyzed with reference to whether it fixed the rate of compensation, and pages 46–47, where the act is analyzed to show that it provided exclusively a working-day divisor for a working-day service, and the same thing in every case.

It seems to us not open to dispute that if the same thing was provided for every case and that same thing was a working-day divisor, any executive order which violates the law in one case must violate it in all.

The analysis made, we submit, fairly meets the contention of the Court of Claims that "Nor could they (meaning the Postmasters General) *plainly* read into the language of the act of 1873 a requirement that the mails be weighed 35 days and divided by 30." One form of expression will do as well as another if they both mean the same thing.

But we question that it is necessary that the requirement could be *plainly* read into the act. If we understand the law of this case, it is sufficient that it can be read into the act at all, whether plainly or not, provided violence be not done to the terms of the act, and in that respect we commend to the court the discussion, in appellant's brief in No. 232, of the act on the theory that it was of doubtful meaning. Indeed, it does seem to us that, at many places in its opinion, the lower court itself has shown that the method overturned by order 412 was well within the meaning of the act.

Counsel for appellant in No. 232 has been content, by showing that a working-day divisor was the only one possible under the act, to negative thus the idea that there was room

in the act for the divisor sought to be established by order 412. Along this line, it is sufficient to say that order 412 gives no effect at all to the word "working" in the act, because it sets up the sole rule which entirely ignores its presence. A 7-day divisor is impossible under the plain language of the act if effect is to be given to every word in it. And the meaning of an inflexible law is not to be changed by a change in conditions which might make it seem desirable to some that a rule established by that law be changed. The law must nevertheless be followed until changed by Congress itself.

Merritt *vs.* Welsh, 104 U. S., 694.

With the foregoing additions, the brief of appellant in the Kansas City, Mexico & Orient case so precisely fits our views that we feel impelled to say that it is not likely to be met by the Government's brief in any other case. I am authorized to say that this expresses the sentiments of counsel in many cases other than those now before the court.

Respectfully submitted,

R. STUART KNAPP,
Amicus Curiæ.